COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000018-CL

COMMONWEALTH OF KENTUCKY — APPELLANT

APPEAL FROM THE JEFFERSON CIRCUIT COURT
ACTION NO. 13-CR-2070-003

JAMES DOSS — APPELLEE

BRIEF FOR APPELLEE, JAMES DOSS

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that on March 23, 2016, a copy of this brief was mailed to Hon. Olu A. Stevens, Circuit Judge, Division Six, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon. Andy Beshear, Attorney General, Criminal Appeals Division, 1024 Capital Center Drive, Frankfort, KY 40601; Hon. Henry G. Gyden, Esq. (*Pro Hac Vice*), Gyden Law Group, 1228 East 7th Ave, Suite 200, Tampa, FL 33605 and Hon. Stanford Obi, Esq., Stanford Law Office PLLC, 1200 Envoy Circle, Suite 40299, Louisville, KY 40299 (*Amicus Curiae* National Bar Association and National Association for the Advancement of Colored People); Hon. Larry D. Simon, 222 South First Street, Suite 307, Louisville, KY 40202 (*Amicus Curiae* Kentucky Association of Criminal Defense Lawyers); and electronically transmitted per agreement to Hon. Dorislee Gilbert, Special Assistant Attorney General, 514 West Liberty Street, Louisville, KY 40202 via dgilbert@louisvilleprosecutor.com. Further, the record on appeal has been returned to the Circuit Court Clerk.

Cicely J. Lambert

STATEMENT CONCERNING ORAL ARGUMENT

On September 24, 2015, in response to the Commonwealth's motion, this Court issued its **Order Granting Certification of Law and Set for Oral Argument,** indicating that "[o]ral argument will be scheduled by later Order."

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COUNTERSTATEMENT

Mr. Doss substantially accepts the Commonwealth's factual statement of the case. Facts as needed will be incorporated into the arguments below.

ARGUMENTS

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED THE JURY PANEL.[1],[2]

Preservation. This issue of whether a trial court can dismiss a jury panel for a fair cross-section violation, when there is one African-American juror on a panel of forty-one, is preserved. It is important to note that although the trial court dismissed the jury panel immediately prior to the seating of the petit jury after the random removal of the sole African American, it is clear that the court was concerned from the very beginning with the panel's underrepresentation of African Americans. VR 11/18/14; 02:56:45. That concern, coupled with continued motions from the defense to dismiss the jury panel (based on violations of the Fourteenth Amendment, Sixth Amendment, and Kentucky Constitution §11), resulted in the court reconsidering its previous decisions and ultimately dismissing the panel based on a finding and conclusion that the panel was not representative of the community. VR 11/18/14; 11:04:29; 01:23:27; 02:52:55;

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[1] Mr. Doss will be consistent with the Commonwealth's references as noted at Commonwealth's Brief [CB] 1, n. 1 – "Jury pool" is the entire pool of jurors responding to juror summonses; "jury panel" or "venire" is the portion of the larger pool assigned to a specific court at a particular time; and "petit jury" or "jury" is the twelve jurors (plus alternates) selected and/or sworn to hear a particular case.

[2] The process employed for jury selection was the "Jefferson County way" which has been held by this Court as not substantially deviating from the jury selection process set forth in the Administrative Procedures of the Court of Justice, Part II, Jury Management and Selection (AP II) and Kentucky Rules of Criminal Procedure (RCr) 9.30 to 9.40. VR 11/18/14; 10:15:48; *St. Clair v. Commonwealth,* 451 S.W.3d 597, 619 (Ky. 2014).

02:56:45. Therefore, the issue decided by the trial court and before this Court is dismissal of the *jury panel* for underrepresenting African Americans under federal and state equal protection and fair cross-section guarantees, and not dismissal of a *petit jury* for not being representative of the community.[3],[4]

Factual summary. In accord with Administrative Procedures of the Court of Justice, Part II, Jury Management and Selection (AP II) §28,[5] the defense made a timely request before *voir dire* to dismiss the forty-one person panel because it included only one African American, as a violation of the constitutional rights of the defendant, an African American, to a jury chosen from a fair cross-section of the community, as well as on due process and equal protection grounds. VR 11/18/14; 11:04:29. In response the Commonwealth argued that a fair cross-section was presumed from the random selection of jury panel. VR 11/18/14; 11:05:08. Holding the motion in abeyance, the trial court noted that this was the first time it had ever had a jury panel with this composition. VR 11/18/14; 11:05:21.

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[3] A transcript of the trial court's ruling is provided in order to clarify the Commonwealth's description of the trial court's actions at CB 21 and 26: "We're talking about, you know, Mr. Doss's right to have a representative jury. A jury that is representative of the community. And what he got, in here, was not that, let's just face it. We called up 41 jurors here, and only have one juror – African-American juror. I don't know that the number is 25% but I think it's closer to 18 to 20. It's unprecedented in here. I've tried a lot of cases. I've never seen anything like it. I'm disturbed. And I struggle with the decision to permit it. But this random draw here, and again, the issue is not one of intent, because it's all random, but what's the result? And the result is that we have a jury that is not representative of the community, number one, number two for whatever it's worth, there is not a single juror, African-American juror on this jury. And Mr. Doss is an African-American man. So, it concerns me, greatly. Enough so, I'm going to grant the motion. I'm going to set aside the jury. Entirely... Set aside the swearing, set aside the jury panel and get a new jury panel up here." VR 11/18/14; 02:56:45.

[4] The Commonwealth below acknowledged that the number of African-Americans in the jury pool for this jury term was abnormally low. VR 11/19/14; 09:44:38.

[5] "A motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors."

After *voir dire*, the defense renewed its constitutional grounds for dismissal, adding that African Americans were substantially underrepresented on the panel - one out of forty-one equaled 2%, as compared to the local African-American census population of 23%. VR 11/18/14; 01:24:54. The Commonwealth responded again that the process was random. VR 11/18/14; 01:27:36. Although noting that the defense motion was well-taken and voicing concerns that the panel was not as representative as normal, the trial court denied the motion by concluding that the random selection process resulted in a jury panel composed of a fair cross-section. VR 11/18/14; 01:23:27 *passim*.

After cause and peremptory strikes, the sole African American remained on the panel, only to be randomly struck during the process reducing the jury panel to the agreed upon number of twelve plus two alternates. VR 11/18/14; 02:50:48. The defense renewed its objection on state and federal constitutional grounds, arguing that "[we're] talking about some basic fundamental right of the jury trial. The idea being that you're judged by the members of your community. ...I would hope that the standard somewhere would be higher than just saying 'I'm sure that downstairs[6] they were random.'" VR 11/18/14; 02:52:50. The Commonwealth again relied on the randomness of the selection process. VR 11/18/14; 02:55:20.

Immediately, the trial court reconsidered its rulings, based upon the defendant's right to a jury representative of the community. VR 11/18/14;

[6] "Downstairs" refers to the second floor location of the Jefferson County Judicial Center, the location of the Jury Pool Administrator's Office and the Jury Pool Assembly Hall.

02:56:45. While the trial court and the defense differed on the local African-American population percentage (18%-20% versus 25%),[7] the court agreed with the defense that this panel was not representative of the community, and despite the situation being unprecedented and the selection process random, it dismissed the jury panel and called up another panel for the next day. VR 11/18/14; 02:56:45.

Four African Americans were included in the next day's forty-one person panel.[8] VR 11/19/14; 01:39:18. The defense moved to dismiss this panel for underrepresentation, and, rather than go through another *voir dire* that resulted in dismissal, the Commonwealth also suggested dismissing the panel. VR 11/19/14; 09:54:48. In denying the motion, the court found the new panel more diverse than the dismissed panel, but not as diverse as normal. VR 11/19/14; 09:59:10. Underscoring the point above that the court's dismissal of the jury the day before was based on the *panel's* underrepresentation – not the petit jury - the court noted that in retrospect it could have sustained defense counsel's motion to dismiss the panel at this point yesterday (before *voir dire*). VR 11/19/14; 09:59:10. Upon selection of the petit jury, the trial court noted that all four African Americans out of the panel of forty-one remained, and that this diversity on the panel (although it was less than 10% as compared to the 18%

[7] The defense actually argued 23%. VR 11/18/14; 01:24:54. The United States Census Bureau Quick Facts estimate for Jefferson County, Kentucky for 2014 for African-Americans was 21.5%. *Quick Facts,* U.S. Census Bureau (2015), http://www.census.gov/quickfacts/table.

[8] Before the panel entered the courtroom for the first time, the sheriff reported that the panel contained three African-Americans, which both the trial court and Commonwealth acknowledged was "abnormally low." VR 11/19/14; 09:44:38.

to 20% of African Americans in the community) was "better than most juries" in the trial court's experience. VR 11/19/14; 01:39:46. The defense's renewed motions to dismiss the panel were denied. VR 11/19/14; 01:38:44-42:09. This jury, with four African-American jurors, later acquitted Mr. Doss. TR 119-120.

Legal Analysis:
The Sixth Amendment Fair Cross-Section guarantee and the Fourteenth Amendment Equal Protection guarantee.

The Commonwealth's certification of law questions are based upon Sixth Amendment fair cross-section analysis, but the Commonwealth's arguments, the defense's objections, and the trial court's dismissal of the jury panel – generically based upon a lack of community representativeness – are also based on Fourteenth Amendment Equal Protection/Due Process grounds. CB[9] I; *supra*. And, "[i]n Kentucky, the right to an impartial jury is protected by Section 11[10] of the Kentucky Constitution, as well as the Sixth and Fourteenth Amendments to the [United States] Constitution." *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013). As such, Mr. Doss will respond to the issues based upon analysis of the Sixth and Fourteenth Amendments and Section 11 of the Kentucky Constitution.[11] But, since the issue decided by the trial court and before this Court is dismissal of the *jury panel* and not dismissal of a *petit jury*, the

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[9] Commonwealth's Brief.
[10] "In all criminal prosecutions the accused has the right to be heard by himself and counsel ... and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage..."
[11] Although this is a certification of law appeal, Mr. Doss is responding as any other appeal pursuant to CR 76.37(10) - once certification has been granted, the "case shall proceed in the same manner as any other appeal."

Commonwealth's arguments as to improper dismissal of the petit jury will not be addressed.

The Sixth Amendment, ratified in 1791 as part of the Bill of Rights, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend VI. In keeping with the Bill of Rights' focus on empowering the people collectively against government power, the Sixth Amendment was enacted not to prevent discrimination but to place a check on the government's use of criminal law to deprive a citizen of life and liberty. *Duncan v. Louisiana,* 391 U.S. 145, 155 (1968). In *Glasser v. United States,* the Supreme Court used the term "cross-section" for the first time in the context of a Sixth Amendment jury representation argument when it stated that jury commissioners could not use their discretion in a way that did not "comport with the concept of the jury as a cross-section of the community" because a "cross-section" was necessary to ensure an impartial jury. *Glasser v. United States,* 315 U.S. 60, 86 (1942). In 1968 in *Duncan,* the Supreme Court applied the Sixth Amendment to the states, via the Fourteenth Amendment. *Duncan*, 391 U.S. at 148. Then in 1975, the Supreme Court in *Taylor v. Louisiana* held that community participation is critical to public confidence in the fairness of the criminal justice system, greatly enhancing reliability and accuracy, and that a petit jury chosen from a

representative cross-section of the community is an essential component of the Sixth Amendment. *Taylor v. Louisiana,* 419 U.S. 522, 527-29, 530 (1975). While the criminal defendant is not entitled to a petit jury of any particular composition, *Taylor* held that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538. Furthermore, it is a fundamental right: "We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation." *Id.* at 530. The Sixth Amendment, therefore, was limited to the impact of underrepresentation in the wheel, pool, panel and venire on the criminal defendant.

In contrast to the Sixth Amendment's right to a fair cross-section, the Fourteenth Amendment was enacted to prohibit discrimination. The Fourteenth Amendment - particularly its Equal Protection Clause - was passed in 1866 after the Civil War and ratified in 1868. It states in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1. Fearing that non-union states would deny the new African-American citizens equal protection of the laws after the Civil War, the Fourteenth Amendment was a direct attack on discriminatory state processes.

Strauder v. West Virginia, 100 U.S. 303, 306 (1880). In *Batson v. Kentucky,* the Supreme Court reiterated its commitment against racial discrimination by the State in the jury selection process:

> More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. *In Strauder, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Id.,* at 306-307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

Batson v. Kentucky, 476 U.S. 79, 85 (1986), *holding modified by Powers v. Ohio,* 499 U.S. 400 (1991), emphasis added. *Batson* also reaffirmed the Supreme Court's recognition in *Swain v. Alabama,* 380 U.S. 202, 203-204 (1965) that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 476 U.S. at 84. *Batson* went on to affirm that a defendant has the right to be tried by a *petit jury* whose members are selected pursuant to nondiscriminatory criteria, a right guaranteed by the Equal Protection Clause, because:

> Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that

> is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

Id. at 86 (*quoting Strauder, supra,* 100 U.S. at 308).

Thus, today, the Sixth Amendment fair cross-section guarantee applies only to the criminal defendant (jurors have no Sixth Amendment rights), and is outcome based (with no *intentional* discrimination requirement) – in other words, the Sixth Amendment guarantees the criminal defendant an impartial jury representing a fair cross-section of the community, to be reflected in the wheel, pool, panel or venire. In contrast, the Fourteenth Amendment equal protection guarantee applies in both civil and criminal cases, extends to all litigants and potential jurors at all stages of the jury selection process (as a guarantee to those historically excluded, and includes representation on the petit jury through the use of peremptory challenge), protects against *intentional* discrimination, and can apply in a particular case. *J.E.B. v. Alabama ex rel T.B.,* 511 U.S. 127, 128 (1994).[12] Both constitutional guarantees apply in Kentucky through the Fourteenth Amendment and Section 11 of the Kentucky Constitution.

The trial court did not abuse its discretion in dismissing the jury panel based upon a violation of Mr. Doss's Fourteenth Amendment Equal Protection rights.

As noted above, Mr. Doss has a Fourteenth Amendment Equal Protection right to a jury selection process – at all stages, from the wheel, pool, panel, venire to the petit jury - that does not intentionally discriminate against African

[12] At CB 13-14, the Commonwealth's notation that it "also has the right to a jury trial" can only relate in the case at bar to an equal protection challenge, or the intentional discriminatory underrepresentation of an historically excluded group, since it is clear that the fair cross-section guarantee of the Sixth Amendment applies only to the criminal defendant.

Americans. As held in *Castaneda v. Partida,* a *prima facie* case of intentional discrimination by the state in jury selection is proven by the defendant establishing 1) that he is a member of a racial group capable of being singled out for differential treatment, and 2) the degree of underrepresentation of that group by comparing (a)(1) the proportion of that group in the total population to the (a)(2) proportion called to serve as jurors, (b) over a significant period of time. *Castaneda v. Partida,* 430 U.S. 482, 494 (1977). The statistical showing over a period of time raises a presumption of intentional discrimination because if the disparity is sufficiently large then it is unlikely due solely to chance or accident. *Id.* at 494-95.

The first prong is easily met by Mr. Doss, who as an African American is a member of a distinct group readily capable of being singled out for differential treatment. The first part of the second prong – 2)(a)(1) - the proportion of African Americans in the total local population – was sufficiently established, although there was a bit of disagreement between the trial court's total population proportion of African Americans at 18% to 20% by local census and the defense's range of 23% to 25%. The Commonwealth did not disagree with either.

The second part of the second prong – 2)(a)(2) - the proportion of African Americans called to serve as jurors over 2)(b) a significant period of time - is where the proof problem lies. Pursuant to AP II §7(1), each potential juror is to receive a jury summons and qualification form, and the qualification form "shall

be provided by the Administrative Office of the Courts and subject to approval by the Chief Justice of the Supreme Court."[13] Neither this form, nor any of the source lists from which names of potential jurors are initially drawn (voter registration, state income tax, and driver licenses, pursuant to KRS 29A.040(1)[186.412, 116.045, 103 KAR 3:040]) collect data on the race of individual jurors. Without the State's official jury qualification form collecting race information under oath from each individual in a given jury pool, or as in this case, panel/venire, a criminal defendant is precluded from proving the number needed for comparison provided in the second part of the second prong - the proportion of African Americans in the jury wheel, pool, panel or venire.

Alternatively, while it would be a better option for the State to officially collect this race information when the jurors appear the first day of jury service – providing the ability to track the proportion of distinct groups from the wheel/pool to the panel/venire – in the case at bar, the fact that all parties, including the trial court, agreed that only one African American (2%) appeared in the forty-one person jury panel, in comparison to 18% to 20% in the community census, establishes disproportionality.

In addition to its failure to collect any data on the race of individual jurors, the State further precludes a defendant from establishing minority underrepresentation in the jury selection process over a significant period of time ("2)(b)") by mandating destruction of all relevant records at the conclusion of a

[13] http://courts.ky.gov/resources/legalforms/LegalForms/005A.pdf; AOC-005, attached in App. A.

juror's service. Pursuant to AP II §14, "[a]fter the randomized jury list has been exhausted and all persons selected to serve as jurors have been discharged, all records and papers compiled in the selection process shall be destroyed." AP II §14. Thus, with no juror racial data collected, and with the prompt destruction of such records as are generated in the jury selection process, the criminal defendant, under the present system of record keeping in Kentucky, has an impossible burden in establishing minority underrepresentation over a significant period of time. No data upon which to base such an attack exists.

What would happen if the state intentionally enacted rules which prevented the compilation, retention and access by the defendant to records relating to search warrants? A criminal defendant would be unable to challenge any search. Similarly, through rules which prevent the collection of any racial data on jurors and which mandate the prompt destruction of such records as do exist, the State has effectively immunized itself from any equal protection challenge by any criminal defendant in the selection of the jury wheel, pool, panel or venire. As noted in *Batson,* "[i]n jurisdictions where court records do not reflect the jurors' race . . . , the burden would be insurmountable." *Batson,* 476 U.S. at 92 n.17. Mr. Doss submits that, as the burden is on the defendant under *Castaneda* to prove underrepresentation under the second prong by a comparison of proportions of African Americans in jury pools over a significant period of time, the State's failure to collect and retain any racial information

constitutes an intentional act resulting in a violation of the rights guaranteed the defendant under the Fourteenth Amendment Equal Protection clause.

Alternatively, even assuming that with the parties in agreement that the panel had only one African American out of forty-one, or 2%, the trial court found the jury that acquitted Mr. Doss, which had a panel of four African Americans out of forty-one (10%), was "better than most juries" in his court. VR 11/19/14; 01:39:46. If 10% African American representation on a given jury panel is better than most juries, then most panels in this trial court division must be less than 10% African American. Given the local census figure of the African American total population, found by the trial court in this case and not challenged by the Commonwealth, of 18% to 20% (or even 23% to 25%), underrepresentation (less than 10% compared to a census of 18% to 20% or higher) over a significant period of time was established. VR 11/19/14; 01:39:46.

As indicated in *Batson* insofar as an equal protection challenge to the use of peremptory challenges, the defendant may establish the second prong in his individual case instead of over a period of time.

> Thus, since the decision in *Swain,* this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Department Corp.,* that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." 429 U.S., at 266, n. 14, 97 S.Ct., at 564, n. 14. For evidentiary requirements to dictate that "several must suffer

> discrimination" before one could object, *McCray v. New York,* 461 U.S., at 965, 103 S.Ct., at 2440 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all.

Batson, 476 U.S. at 95-96. Herein, it was established that with the local population of 18% to 20% African American, only one African American in a jury panel of forty-one (2%) resulted in underrepresentation of African Americans on this single panel.

The trial court has broad discretion in the jury selection process. In *Oro-Jimenez v. Commonwealth,* this Court stated:

> RCr 9.30 through RCr 9.40, along with Part Two of the Administrative Procedures of the Court of Justice, sets forth the jury selection procedures for criminal cases in Kentucky. *Brown v. Commonwealth,* 313 S.W.3d 577, 596 (Ky. 2010). "Under these provisions the trial court is vested with broad discretion to oversee the entire process, from summoning the venire to choosing the petit jury which actually hears and decides the case." *Id.* Accordingly, we review the jury selection procedures employed by the trial court for abuse of discretion; "that is, whether the ruling can be characterized as arbitrary, unreasonable, or contrary to sound legal principles." *Id.*

Oro-Jimenez v. Commonwealth, 412 S.W.3d 174, 176-77 (Ky. 2013). Mr. Doss submits that when a defendant, as here, is faced with an impossible burden of demonstrating juror underrepresentation over a substantial period of time and such impossibility results from the operation of state rules, the trial court has the discretion to relieve him of what would normally be his obligation to meet that burden. This Court has held no abuse of discretion in a trial court's grant of a continuance where the Commonwealth would have been extremely prejudiced by lack of the testimony of the complaining witness in a rape case (*Slone v.*

Commonwealth, 382 S.W.3d 851, 856 (Ky. 2012)), and the Court held that it was an abuse of discretion not to allow a continuance when it was impossible for the appointed attorney to prepare for trial in the time allotted (*Smith v. Commonwealth,* 133 Ky. 532, 118 S.W. 368, 369 (Ky. 1909)). In the Eighth Circuit, in determining if a plan administrator abused its discretion in interpreting a plan for disability benefits, "[t]here may be other cases in which objective evidence simply cannot be obtained, and it would be unreasonable for an administrator to demand the impossible." *Pralutsky v. Metropolitan Life Ins. Co.*, 435 F.3d 833, 839 (8th Cir. 2006) (citing *Brigham v. Sun Life of Can.,* 317 F.3d 72, 84 (1st Cir. 2003)). And, in a property division dissolution case, the Missouri Court held that placing an "impossible burden" on one party insofar as payments from the award was an "abuse of discretion." *Michael v. Michael*, 747 S.W.2d 645, 648 (Mo. Ct. App. 1988). As stated by Justice Leibson, "[t]o shift to the appellant the burden of proving that he was denied a fair trial by refusing the change of venue *is to impose an impossible burden, to turn a fundamental right into an empty phrase.*" *Whitler v. Commonwealth*, 810 S.W.2d 505, 510 (Ky. 1991) (Leibson, J., dissent). Similarly, this Court would place Mr. Doss under an impossible burden should it compel him to prove minority underrepresentation in jury selection over time; a task made impossible without the juror racial data the State refuses to collect in the first place. For this Court to then find that the trial court abused its discretion by refusing to compel Mr. Doss to complete an impossible task, "turn[s] a fundamental right into an empty phrase."

The trial court did not abuse its discretion in dismissing the jury panel based upon a violation of Mr. Doss's Sixth Amendment rights to an impartial jury selected from a fair cross-section of the community.

As stated in *Taylor,* the right to selection of a petit jury from a representative fair cross-section of the community is "an essential component of the Sixth Amendment right to a jury trial." *Taylor,* 419 U.S. at 528. The Supreme Court, in *Duren v. Missouri,* established the three prong test for a violation of the fair cross-section right under the Sixth Amendment: 1) the group alleged to be excluded from the jury system must be a distinctive group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) underrepresentation of the group is due to systematic exclusion of the group in the jury selection process (systematic is defined as "inherent in the particular jury selection process utilized" and does not require evidence of intentional discrimination). *Duren v. Missouri,* 439 U.S. 357, 364, 366 (1979); *see also Berghuis v. Smith,* 559 U.S. 314, 319 (2010). In other words, the first two prongs in an equal protection and fair cross-section challenge are similar – 1) distinctive group (except that the equal protection distinctive group must, in keeping with the guarantee against intentional discrimination by a state actor, have experienced historical discrimination) and 2) comparison between proportion of that group in the total population to the proportion of the group in the jury wheel, pool, panel or venire. The third prong under equal protection and fair cross-section are similar in that both require showings of

underrepresentation from the second prong over a period of time (but see *Batson's* single incident of intentional discrimination as proof of an equal protection violation) – the difference is that equal protection requires intentional discrimination, while fair cross-section can be unintentional.

In application of the *Duren* fair cross-section test, the first prong requires that the group alleged to be excluded must be a distinctive group in the community. *Duren,* 439 U.S. at 364. Just as in equal protection, there is no question that African Americans constitute a distinctive group under the Sixth Amendment fair cross-section analysis, and the Commonwealth concedes that this hurdle has been met. CB 18; *Lockhart v. McCree,* 476 U.S. 162, 175 (1986).

The second prong of *Duren* requires that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community. While the defendant is not entitled to a petit jury of any particular composition, *Taylor,* 419 U.S. at 538 holds that a Sixth Amendment violation may occur at any other stage of the selection process from which the petit jury is selected – jury wheel, pool, panel or venire. *See also Duren,* 439 U.S. at 368, n. 26. Additionally, this comparison is to the community as a whole – not the jury-eligible community. *Id.* at 364-65. The Commonwealth's reference to *Ford v. Commonwealth,* 665 S.W.2d 304, 308 (Ky. 1983) for census data being unreliable for a jury challenge as it does not provide "a proper standard for comparison" because not everyone in the census is eligible to serve as a juror is contrary to *Duren's* requirements that statistics be

used to prove the second prong, and in *Duren* the Supreme Court specifically relied upon census data of the total community population.[14] *Duren,* 439 U.S. at at 365. Therefore, the defendant can establish the second prong by showing a disproportion between the number of African Americans in the local community as a whole and (excluding the petit jury) either 1) the number on the jury wheel/master list of jurors; 2) the number who showed up to court for jury service – the pool; and 3) the number at any other stage of the process (panel/venire).

As indicated above, however, Mr. Doss (as well as any criminal defendant in Kentucky) is unable to meet this second prong because the State's jury selection process and rules do not require the collection of juror race information. And, as indicated above, although the trial court noted that the percentage of African Americans in the local community by census was 18% to 20%, due to the State's failure to collect race information Mr. Doss was presented with an impossible burden in officially comparing the census figure to the wheel, pool, panel or venire.

Alternatively, as stated above, while it would be a better option for the State to officially collect juror's racial data on the first day of jury service – providing the ability to track the proportion of distinct groups from the

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[14] *See e.g. U.S. v. Rodriguez-Lara,* 421 F.3d 932, 943 n.9 (9th Cir. 2009), *overruled on other grounds by U.S. v. Hernandez-Estrada,* 749 F.3d 1154 (9th Cir. 2014), (quoting 28 U.S.C. §1865(b)): "Whereas census data are readily accessible, jury-eligible population data will often be quite hard for fair cross-section claimants to obtain, given the difficulty of sorting out from the general population figures the number of individuals who (for example) are not citizens, who are not fluent in English, or who are 'incapable, by reason of mental or physical infirmity, to render satisfactory jury service.'"

wheel/pool to the panel/venire – in the case at bar, the fact that all parties, including the trial court, agreed that only one African American (2%) appeared in the forty-one person jury panel, in comparison to 18% to 20% in the community, is sufficient evidence of underrepresentation.

The third prong of *Duren* requires that underrepresentation of the group is due to systematic exclusion of the group in the jury selection process but does not also require intentional discrimination. In *Duren,* this was accomplished by a compilation of data from weekly jury selections over a period of nearly a year. *Id.* at 366. Just as Mr. Doss had an impossible burden of showing the disproportion of African Americans on a particular wheel, pool, panel or venire due of the failure of the State to collect juror race information, this impossible burden extends to Mr. Doss's ability to demonstrate a systematic exclusion. Further, as jury selection records are mandated to be destroyed once the jury is discharged, Mr. Doss is never going to be able to compile data from wheel to wheel, pool to pool, panel to panel or venire to venire over a series of weeks, months or years. In Kentucky, therefore, the rules and statutes make it impossible to demonstrate systematic exclusion.[15]

In *Mash v. Commonwealth,* this Court denied a Sixth Amendment fair cross-section challenge to a jury panel similar to herein - the panel contained

[15] The Commonwealth's argument that "there was no evidence regarding the racial makeup of the entire pool of potential jurors from which the 41 jurors were randomly assigned to Division 6. Nor is there any evidence regarding the racial makeup of any past pool or panel of potential jurors," completely misses the impossible burden placed upon Mr. Doss or any other criminal defendant. CB 25-26.

one African American out of a panel of forty-two. *Mash v. Commonwealth*, 376 S.W.3d 548 (Ky. 2012). This Court denied the challenge as insufficient to demonstrate unreasonable underrepresentation or systematic exclusion because the defendant failed to provide information about the number of African Americans in McCracken County, did not provide comparison information about the racial composition of other jury panels in the county, and did not identify anything about the jury summonsing process suggesting racial imbalance. *Id.* at 553. While *Mash* is similar in the type of proof offered herein, it is distinguishable because the defense did not argue and the Court did not address the defense's "impossible burden."

Likewise, in *Miller v. Commonwealth,* this Court found a reference to a 2010 U.S. Census insufficient to establish a *prima facie* fair cross-section violation in a case where none of the thirty-seven on the jury panel were African American because the defendant failed to provide any data on past Adair County jury panels insofar as underrepresentation and systematic exclusion. *Miller v. Commonwealth,* 394 S.W.3d 402, 409-10 (Ky. 2011). Just as in *Mash,* a distinction can be made because the defense did not argue and this Court did not address the defense's "impossible burden." How was the defendant in *Miller* or *Mash* to provide this data when no official race data is collected from jurors and the jury selection documents are destroyed after each discharge of the jury?

Alternatively, in the present case, there was evidence of systematic exclusion. The trial court specifically found during selection of Mr. Doss's second

jury (from the same jury wheel/pool as the dismissed jury) that it was selected from a panel of forty-one with four African Americans. While the percentage of African Americans on the second panel exceeded the first panel's 2% proportion of African Americans it was still, at less than 10% African American, significantly less than the 18% to 20% African-American community population. VR 11/19/14; 01:39:46. The trial court also indicated that this representation was "better than most juries" in his court, noting that the underrepresentative amount of less than 10% was still more than typical. VR 11/19/14; 01:39:46. Given that in the defendant's own case, he was presented with not one but two panels, each significantly underrepresentative of African Americans, and the trial court's own finding that such percentages were "better than most juries" in its experience, there was evidence of systematic underrepresentation on the jury panel.

Commonwealth's ability to provide rebuttal proof. The Commonwealth additionally argues that if Mr. Doss had met his burden of establishing a *prima facie* fair cross-section violation, the trial court was obligated to allow the Commonwealth the opportunity to present rebuttal evidence to sustain its burden of proof. First, this issue is not preserved. When the trial court granted the defense motion to dismiss the panel, the Commonwealth relied on its randomness argument, did not ask for any further relief, and specifically did not ask for an opportunity to rebut the finding of a *prima facie* case. VR 11/18/14; 11:05:08; 01:27:36-28:23; 02:51:17; 02:55:20-56:45. Second, even if

the trial court had granted a request by the Commonwealth to present rebuttal evidence, the Commonwealth would have had the same impossible burden as Mr. Doss. It would likewise have had no official historical data to present to the court, given that Kentucky does not collect any juror racial data.

Potentially, any rebuttal by the Commonwealth would necessarily fall into two responses: 1) Evidence showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result (i.e., disproportionate number of Caucasian jurors), and/or 2) establishing that there is a significant state interest serving as justification for a fair cross-section infringement. *Alexander v. Louisiana,* 405 U.S. 625, 631-32 (1972); CB 23-25; *Duren,* 439 U.S. at 368. But the Commonwealth's randomness argument below and, as a potential sub-argument, that the jury administrators are following the processes established by rule, statute and case law, is not the cure. VR 11/18/14; 11:05:08. The Nevada Supreme Court noted:

> While Clark County's Jury Commissioner is correct that "[a] jury of one's peers is simply a 'randomly selected cross section of the members of your community,' " this constitutional guarantee is not satisfied by blindly following statutory mandates. "To fairly represent the community, there must be an awareness of the make-up of that community." Therefore, jury commissioners should be cognizant of the makeup of their community, should compare this with the makeup of the lists used in the jury selection process and the resulting jury pool, and should strive to create lists of prospective jurors that represent an accurate cross section of the community.

Williams v. State, 125 P.3d 627, 632 (Nev. 2005) (internal citations omitted). The Nevada Court also noted that "without knowledge of the composition of the jury

pool and jury lists, an assertion that they provide juries comprising a fair cross-section of the community is mere speculation." *Id.* at 632 n.18. Similarly, without the ability to officially know how many African Americans were in the wheel, pool, panel or venire, the Commonwealth is also unable to establish a significant state interest as justification for a fair cross-section infringement. It all comes down to this - to prove any violation, or to rebut any *prima facie* case, the starting point is who is in the jury wheel, pool, panel or venire. And in Kentucky, that is an impossible burden, even for the Commonwealth in rebuttal to the trial court's finding of a *prima facie* case by the defendant.

The Commonwealth's "sky is falling" argument presupposes that the collection of juror race information will result in more racial divisiveness. CB 27-28. The Commonwealth's reliance on *Alexander* can be easily distinguished. *Alexander,* 405 U.S. at 630-632. In *Alexander* (a 1972 case occurring before the advent of computer programs for jury selection), the Supreme Court noted that identification of the race of jurors on the questionnaire and the juror information card provided the jury commissioners with the opportunity for racial discrimination because "these racial identifications were visible on the forms used by the jury commissioners, although there is no evidence that the commissioners consciously selected by race." *Id.* at 630. Two cases cited by *Alexander,* also obviously pre-computer selection cases, found discrimination where jurors were chosen 1) from segregated tax lists where the Caucasian jurors had white cards and African American jurors had yellow cards and 2) from a one-volume tax

digest divided into separate sections for Caucasians and African Americans, with African Americans also having the additional designation of a "(c)." *Id.* at 631. It is difficult to see how in this age of computer-generated jury selection, even with collection of a juror's race for purposes such as equal protection and fair cross-section challenges, the computer management system could not make random selections which are not based on race. A computer system making random selections from sources not based on race is easily distinguishable from jury commissioners making "random" selections from a source list that is completely based on race. And *Parents Involved in Community Schools vs. Seattle School District No. 1* has no application to the jury selection process herein. *Parents Involved in Community Schools vs. Seattle School District No. 1,* 551 U.S. 701, 720 (2007) (holding that school districts' allegedly compelling interest of diversity in higher education could not justify the districts' use of racial classifications in student assignment plans under the equal protection clause). Collection of juror race information does not mean that race will be a determinative factor in jury selection. *Instead, collection of juror race information will allow transparency in the selection process.* Racial distinctions by the government are proper in the jury selection process, if only to be able to confirm that the government, under standards set by the United States Supreme Court, is providing the defendant with a constitutionally mandated jury representative of the community. *See, infra,* Conclusion, regarding the federal court's collection of juror race, gender

and ethnicity on their juror questionnaires/summonses and retention of such information for challenge purposes.

Lastly, it is well settled that "an appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result." *See Emberton v. GMRI, Inc.,* 299 S.W.3d 565, 576 (Ky. 2009). The trial court reached the correct conclusion, both on equal protection and fair cross-section grounds, in dismissing the jury panel based on underrepresentation of African Americans – 2% on this panel in a community consisting of 18% to 20% African Americans. The trial court did not abuse its discretion because Kentucky created an impossible burden for Mr. Doss, both for this panel and systematically, by its rules intentionally not collecting juror race information from the jury wheel, pool, panel or venire from which the petit jury is eventually selected, and by destroying juror information when the jury is discharged. This impossible burden has rendered meaningless the right to an impartial jury representative of the community under the Sixth and Fourteenth Amendment and Kentucky Constitution §11, guaranteed to Mr. Doss and any other criminal defendant in Kentucky.

II. AS ARGUED ABOVE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED THE JURY PANEL. ALTERNATIVELY, THE COMMONWEALTH HAD REMEDIES THAT IT DID NOT PURSUE.

Preservation. The issue of whether the Commonwealth has a right to proceed with a petit jury when it disagrees with the trial court's ruling dismissing the jury panel for a fair cross-section violation is arguably preserved to the

extent that the Commonwealth did object to dismissal of the jury panel on the basis that the jury selection process was random. VR 11/18/14; 11:05:08; 02:51:17.

Argument. The Commonwealth's Argument II is a continuation of Argument I, presupposing the factual predicate that the trial court abused its discretion when it dismissed the jury panel. Based on Argument I, *supra,* reasoning that the trial court properly dismissed the panel as equal protection and fair cross-section violations due to the failure of the jury panel to be representative of the community and in the face of the impossible burden of proof by the State's failure to collect juror race information and retain jury selection information, Mr. Doss continues to respectfully disagree that the trial court abused its discretion.

Simply, the Commonwealth is correct that if the defense motion had failed, then it would have had a right to continue forward with the jury panel, and ultimately the petit jury, as constituted. CB 30. But, since the trial court did not rule in the Commonwealth's favor, and the Commonwealth disagreed with the trial court's ruling, the Commonwealth is arguing that its remedy is the "right" to proceed with the "duly selected jury." CB 29-33. The only "right" available to the Commonwealth in the face of an adverse ruling by the trial court is the ability to pursue other options, such as a petition for relief in the appellate court via Kentucky Rules of Civil Procedure (CR) 76.36, and a petition for

intermediate relief on the "ground that he/she will suffer immediate and irreparable injury before a hearing may be had on the petition." CR 76.36(4).

Ultimately, the Commonwealth's real concern is highlighted in its query at CB 33: "[i]f the trial court is allowed time and time again to dismiss such panels despite no evidence of systematic exclusion or intentional discrimination, justice is unfairly and unnecessarily delayed." First, it is important to note that the Commonwealth's concerns are spurious. The trial court was able to easily seat a more representative jury on the second day from a panel of forty-one that included four African Americans. Second, as stated in Argument I, the Sixth and Fourteenth Amendment rights at issue herein inure to the defendant (Sixth) and the litigants and jury members (Fourteenth). The Commonwealth's concerns are subservient to the defendant's Sixth Amendment right to an impartial jury representative of the community. With regard to the Sixth and Fourteenth Amendments, since the State has immunized itself from a successful jury selection challenge by not officially collecting the necessary juror race information, and by destroying jury selection documents upon discharge of the jury, the Commonwealth's fears of the loss of judicial economy, traditional notions of fair play and substantial justice, avoidance of unnecessary delay and extra proceedings, and common sense and logic in the potential for the trial court's repeatedly ruling against it in jury selection matters are hypocritical. As indicated above, the Commonwealth has remedies for adverse rulings by the trial court. With no records, however, the defendant has no remedy in mounting a

successful constitutional challenge to jury selection. Where is the cry for "fair play," "substantial justice" and "common sense and logic" for the defendant's constitutional rights?

III. THIS ISSUE IS NOT PRESERVED. ALTERNATIVELY, THE TRIAL COURT'S DISMISSAL DID NOT INFRINGE ON THE RIGHTS OF POTENTIAL JURORS.

Preservation. This issue is not preserved. As indicated above, Fourteenth Amendment equal protection rights extend to potential jurors who, based on race, are intentionally denied the opportunity to serve on juries by discriminatory state actors. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 128 (1994); *Georgia v. McCollum,* 505 U.S. 42, 49 (1992); *Carter v. Jury Comm'n of Greene Cnty,* 396 U.S. 320, 329 (1970). The Commonwealth did not argue below that the individuals on the dismissed jury panel had a constitutional right, under any constitutional provision, to sit as jurors. This issue, therefore, is not preserved for review by this Court, and as the Commonwealth notes, any argument on these grounds must be reviewed under a palpable error standard, Kentucky Rules of Criminal Procedure (RCr) 10.26. CB 11.

Argument. The Commonwealth summarizes the issue as follows: "The question is whether there was any reason – other than the race of these jurors – justifying their exclusion from jury service." CB 34. The clear answer is "yes."

It is important to first note that the Commonwealth again mixes Sixth and Fourteenth Amendment arguments. The Commonwealth argues in the context of the lack of a fair cross-section, or Sixth Amendment, violation, but a Sixth

Amendment right to an impartial jury composed of a fair cross-section of the community is a *right solely belonging to the criminal defendant.* CB 34; *Taylor v. Louisiana,* 419 U.S. 522, 528 (1975); *Berghuis v. Smith,* 559 U.S. 314, 319 (2010); *Patton v. United States,* 281 U.S. 276, 297 (1930). Jurors simply do not have a Sixth Amendment right to an impartial jury composed of a fair cross-section of the community. Any Commonwealth arguments, therefore, in reliance on a juror's Sixth Amendment fair cross-section right lacks any legal basis.

In contrast, the Fourteenth Amendment Equal Protection guarantee applies to litigants *and jurors* in criminal and civil trials, and the Commonwealth has standing to bring a cause of action on behalf of jurors. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 128 (1994); *Georgia v. McCollum,* 505 U.S. 42, 49 (1992); *Carter v. Jury Comm'n of Greene Cnty,* 396 U.S. 320, 329 (1970). The Commonwealth relies on *McCollum,* where the Supreme Court extended the protection previously afforded defendants and jurors against race-based intentionally discriminatory state action to include action by a criminal defendant (state actor) in the use of peremptory challenges. *McCollum,* 505 U.S. at 59. The Commonwealth's argument extends *McCollum* to cast the trial court as the "state actor" intentionally discriminating against Caucasian jurors when it dismissed the jury panel as not representative of the community. The Commonwealth's argument compares two distinct and incomparable items - there is no comparison between excluding an individual juror solely based on race, versus

dismissing a panel consisting solely of Caucasians as a constitutional violation because it was not representative of the community.

If, however, one uses the equal protection anti-discrimination cases as precedent, these cases allow peremptory challenges to be used on any individual, regardless of race, as long as there is a racially neutral reason. *Batson v. Kentucky,* 476 U.S. 79, 87, 97 (1986). Herein, it is clear that the trial court had a racially neutral reason for dismissing the jury panel – the lack of a jury panel representative of the community. Similarly, the trial court would have been legally justified in dismissing an unrepresentative jury panel consisting of forty African Americans and one randomly struck Caucasian. The trial court's actions were racially neutral and constitutionally sound.

Next, Mr. Doss takes issue with the Commonwealth's statement which incorrectly alleges "group bias" in the trial court's dismissal of the panel. According to the Commonwealth:

> The trial court specifically expressed that because Appellee was an African American man it was concerned about the lack of any African American juror, implying – without any evidence – that the jury, because it lacked African Americans, could not be fair to an African American defendant. This is precisely the type of "group bias" and unjustified assumption that is unwarranted. . . [I]t is unfair any longer to assume that because of a person's skin color he or she cannot adequately relate to or at least understand and empathize with the experiences of a person of a different race or ethnic background.

CB 36, n 10.[16] In dismissing the panel, however, *no such implication was made.* In fact, just the opposite was stated by the trial court:

> Well, look. I mean we're not talking about - here is a difficult issue, because - there's some, underlying all this is some underlying, I don't know, presumption that that people of similar races think alike or would be fairer to one another than somebody else would be and that's not true as a premise. *But we're not talking about that here. We're talking about, you know, Mr. Doss's right to have a representative jury.* A jury that is representative of the community. And what he got, in here, was not that, let's just face it. We called up 41 jurors here, and only have one African-American juror. I don't know that the number is 25% but I think it's closer to 18 to 20.

VR 11/18/14; 02:56:45, emphasis added.

Lastly, the Commonwealth's reliance on the trial court's right to excuse individual jurors for cause as having no application to dismissal of the entire panel has no bearing on this issue because the panel was not dismissed for "cause" - the trial court had a legitimate legal reason for dismissing the entire panel. CB 35-36.

Finally, because the issue is unpreserved, RCr 10.26 requires this Court to review the trial court's dismissal of the jury panel for "manifest injustice," which, under *McCleery v. Commonwealth,* has been described as "a repugnant and intolerable outcome." *McCleery v. Commonwealth,* 410 S.W.3d 597, 606 (Ky. 2013). *Martin v. Commonwealth,* has also described "manifest injustice" as a "probability of a different result," and an error that is "shocking or jurisprudentially intolerable." *Martin v. Commonwealth,* 207 S.W.3d 1, 3, 4 (Ky.

[16] In contrast, the Commonwealth does acknowledge at CB 29 n. 8 that there are opinions and studies indicating that all-white juries are more likely to convict than are juries containing a more diverse mix of individuals.

2006). When the defendant argues "manifest injustice," the analysis is whether the defendant would have been convicted "but for" the trial court's error. Herein, as it is the Commonwealth's argument, the question is whether the Commonwealth would have gotten a different result – a conviction – with the all-Caucasian jury panel that had been dismissed, as opposed to the acquittal with the more diverse jury. The Commonwealth has failed to prove palpable error.

IV. ALTHOUGH PRECEDENT IS CLEAR THAT A JUROR'S PREVIOUS *VOIR DIRE* RESPONSES CAN BE CONSIDERED IN A SUBSEQUENT CASE, THE COMMONWEALTH HAS NOT DEMONSTRATED PREJUDICE.

Preservation. This issue is preserved. Before *voir dire* of the new panel, the Commonwealth inquired as to the recourse for a juror who appeared on both panels and gave conflicting *voir dire* answers under oath. For example, what if the juror on the dismissed panel who had indicated that he did not trust the police stated the opposite on the second panel - that he trusted the police?[17] VR 11/19/14; 09:50:23; 09:52:58; 09:53:54; 09:54:17. The trial court responded that the dismissed panel's *voir dire* did not happen; therefore, no questions were to be incorporated from nor any motions to strike be made based on the dismissed panel, although the attorneys would obviously have some insight into any returning jurors. VR 11/19/14; 09:51:25; 09:52:35; 09:53:15; 09:53:56.

Argument. A juror's responses during a previous *voir dire* are usable in a subsequent *voir dire,* but whether it constitutes abuse of discretion or reversible error is fact and case-specific. *Compare Dickerson v. Commonwealth,* 174

[17] Despite the Commonwealth's concern, this particular juror was consistent in his *voir dire* responses. VR 11/19/14; 09:50:00-51:05; 10:42:00.

S.W.3d 451, 461 (Ky. 2005) (reversible error occurred when jurors on the defendant's handgun trial *voir dire* had learned in the defendant's sodomy trial *voir dire* that he used a handgun to forcibly sodomize a child under twelve, and three served as jurors on the subsequent handgun trial) and *Merriweather v. Commonwealth,* 99 S.W.3d 448, 450-51 (Ky. 2003) (no abuse of discretion/reversible error occurred for refusing to strike for cause six jurors who had participated in the *voir dire* of the defendant's previous, unrelated assault case because subsequent *voir dire* revealed that the jurors had only vague recollections of the nature of the charge in the prior trial).

Practically speaking, in Kentucky it is fairly easy to compare previous and current *voir dire* because Kentucky video records all court proceedings. CR 98. The issue, however, is timeliness, for even with a video record the attorney must have the ability to obtain, review and compare the previous and current *voir dire* video and jury panel lists. There is an especially short turn-around in Jefferson County whose jurors are in multiple divisions over only a two-week period. CB 37.

Ultimately, although the trial court erred herein, precedent is clear that the complaining party can only get relief if it demonstrates prejudice. *See Gabbard v. Commonwealth,* 297 S.W.3d 844, 854 (Ky. 2009). In Mr. Doss's subsequent jury panel *voir dire* no issue arose as to any conflicting/contradictory answers from the previous *voir dire*. VR 11/19/14; 12:38:33-42:27; 09:34:28-

01:39:46. Therefore, the Commonwealth was not prejudiced by the trial court's ruling.

CONCLUSION

Potential remedies. Under both the Sixth and Fourteenth Amendments and Section 11 of the Kentucky Constitution, it is the *government's responsibility* to provide the impartial jury chosen from the representative jury wheel, pool, panel or venire. In Kentucky, the State's failure to collect or retain records on juror race in the selection of the "representative" jury wheel, pool, panel or venire allows the State to rely on the randomness of the jury selection process, in turn immunizing itself and/or jury administration from challenges. As the State's constitutional burden, it is unfair to place blame on the jurors who do not receive or respond to the juror summons or on criminal defendants who have an impossible burden to prove the challenge due to the State's failure to collect or retain the necessary records.

Underrepresentation of minorities on juries is a reality. Studies from states and the National Center for State Courts (NCSC) consistently demonstrate that African Americans and Hispanics are underrepresented on juries. Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing it with Equal Protection,* 64 HASTINGS L.J. 141, 145, n.18 (citing studies in Nebraska, Florida, Michigan, Minnesota, Pennsylvania, South Dakota, New York, Alaska, Georgia, Ohio, Oregon, and NCSC). Such underrepresentation can have a significant effect, as noted by the National Bar

Association and National Association for the Advancement of Colored People in their *Amicus Curiae* brief. Although some studies are research oriented while others are merely anecdotal, their results do demand attention. In *Listen: Seeking – and Not Finding – Racial Balance on Louisville Juries,* a WFPL staff article cited a Duke University study (https://today.duke.edu/2012/04/jurystudy) that found that from 2000-2010, all-Caucasian juries in Florida convicted African-American defendants sixteen percent more often than Caucasian defendants, a number that went to "nearly zero when at least one member of the jury was" African American. *Listen: Seeking – and Not Finding – Racial Balance on Louisville Juries*, WFPL (Nov. 24, 2015), *available at* http://wfpl.org/listen-racial-imbalance-louisville-juries/.

Meanwhile, while federal and state courts deny relief due to the defendant's inability to put on sufficient (or in Kentucky, any) proof of an underrepresentative jury, Professor Chernoff cites to some of the same courts that admit to being "disturbed" by the evidence of racial disparity in their jury systems and urge the taking of remedial actions. Chernoff, 64 HASTINGS L.J. at 146. Similarly, in the case at bar the trial court noted that it was "concerned about how the jury panel has come out" and used the term "troublesome."[18] VR 11/18/14; 01:23:27. But unlike the above referenced courts that denied the

[18] In *United States v. Green,* 389 F. Supp. 2d 29, 40 (D. Mass. 2005), the Court noted "[a]s the court-appointed expert concluded: 'Metaphorically speaking, there has to be a statute of limitations on how long a District can lament the undesirability of the underrepresentation of minorities in its jury pools without feeling compelled to act with imagination to do better.' Abramson, *Report* at 64–65."

challenge while acknowledging the problem, the trial court herein acted to protect Mr. Doss's constitutional rights.

In responding to the Commonwealth's arguments, Mr. Doss has noted with particularity certain realities for the defense in bringing a jury challenge, and a discussion addressing the remedies to those realities seems appropriate in this setting based on the Court's interest in granting certification of the law on the Commonwealth's jury selection questions. Taking remedial action, as outlined below, allows the state to fulfill its constitutional responsibilities in providing an impartial jury representative of the community, and allows the defendant a legitimate seat at the table.

a. The Collection of, and Access to, Racial Information.

An easy fix in Kentucky is to require the jury questionnaires/summons to collect juror race information. This official, under oath, collection of information creates a record that can be used to verify and/or challenge underrepresentation in the jury selection process. The federal district court already collects race information, as well as gender and ethnicity, on its jury forms, adding as an explanation:

> Federal law requires you as a prospective juror to indicate your race. This answer is required solely to avoid discrimination in juror selection and has absolutely no bearing on qualifications for jury service. By answering this question you help the federal court check and observe the juror selection process so that discrimination cannot occur. In this way, the federal court can fulfill the policy of the United States, which is to provide jurors who are randomly selected from a fair cross section of the community.

Juror Qualification Questionnaire, Form No. F-15467-OMNI-L, *available at* https://www.lamd.uscourts.gov/sites/default/files/Jury/sample_jury_questionnaire.pdf. Kentucky would simply need to change its jury selection rules to allow for the collection of juror race information through the juror qualification form/summons. AOC-005; AP II §7(1). And although this case involves race issues, the collection of gender and ethnicity information should also be considered.

Additionally, the federal court is required to keep on file Form AO-12 under 28 U.S.C. § 1863(a). The AO-12 form serves to compare the "demographic characteristics of a particular qualified jury wheel against the demographic characteristics of the corresponding community." *Omotosho v. Giant Eagle, Inc.,* 997 F. Supp. 2d 792, 799 (N.D. Ohio 2014). The AO-12 form is available to federal defendants through the discovery process. Kentucky could simply change its jury selection rules to allow broad access to, and retention of, jury selection documents similar to the AO-12. AP II §§ 13, 14. The ability to monitor such information also provides needed transparency for better public confidence in the system.

b. Access to the Randomization of the Jury Wheel, Pool, Panel and Venire.

The Commonwealth below argued that the selection process was "random" and, in this case, even the defense stated that it was not necessarily calling into question the randomization procedures. VR 11/18/14; 11:05:08; VR 11/19/14; 09:58:37. An argument, however, that the jury wheel, pool, panel or

venire is chosen randomly by a computer effectively immunizes any challenge in Kentucky because the state, through its jury administrator, can argue that it cannot intentionally discriminate or systematically exclude minorities if the race of the potential jurors is not known. Conversely, because no juror race information is collected, the defendant has no rebuttal to this argument. It seems clear that when a source list is not racially representative, even a random, race-neutral selection from a computer will produce an underrepresentative jury pool. Chernoff, 64 HASTINGS L.J. at 188. But without collection and retention of juror race information, it is impossible to know.

Also, as Sixth Amendment violations do not have to be intentional, computer errors in randomization programs can constitute violations. For example:

> Underrepresentative jury pools have been created, for example, by a computer program that arranged lists of qualified jurors "alphabetically by the fifth letter of the last name," a system which was "impartial ... unintentional, blind and benign." But the process inadvertently grouped different ethnic groups onto the same jury panels; one panel included "an inordinate number of persons with apparently Jewish names. [Another] included[d] 19 of 65 names with apparently Italian names," and in another, "10% of the panel [had] the last name 'Williams.'" Other jurisdictions created underrepresentative jury pools when a computer error accidentally set the parameters for the selection of names such that only the lower number zip codes were used as a source of names, and the urban area with the largest percentage of people of color had the lower number zip code. Elsewhere, a system organized the townships in the jury pool in alphabetical order and limited jury summons to the first 10,000 jurors on the list, thereby excluding "Wayne Township" residents, who constituted 75.1% of the count's African-American population. In Washington, D.C., a computer programming error excluded all persons with misdemeanor convictions (where the law only disqualified person with felony

> convictions), and permanently excluded from jury service any person who had indicated a temporary disqualification because they had a pending criminal charge or had not yet satisfied the residency requirement. Even properly functioning computer programs have had unexpected results: One program for identifying duplicate names to eliminate from the jury list compared the full last name and the first four letters of the first name; if there was a match, the name was dropped from the jury list. But because "many members of the Hispanic community share common surnames and first names" the evidence showed that Hispanics were likely erroneously deleted.

Id. at 187-88. Computerized randomness is thus not a magic talisman. Errors have and can be made that cause underrepresentation.

Because programmers can make unintentional mistakes that result in discrimination, in order to verify that the randomization program is not underrepresenting minorities, the remedy is access to the computer programs; the computer programmers; the jury wheel, pool, panel and venire; and data and documents related to the summonsing process and response to summonses. After a jury challenge in Dallas County, Texas, new computer programs were implemented to address the "skewed" jury pool that in 2005 comprised only 11% of Latinos although the population was 26%. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy,* August 2010, p. 48, http://www.eji.org/raceandpoverty/juryselection, *citing* Jennifer Emily, *Jury Pool System Gets an Upgrade, More Notices, Improved Tracking Designed to Boost Participation,* Dallas Morning News, Sept. 14, 2009, at 1B. These changes included updating addresses annually, removing repeat addresses, and using computer-based jury forms and questionnaires.

Although Kentucky does not collect juror race information, KRS 29A.110 and AP II §13 do provide access to jury selection information from both the circuit court and the Administrative Office of the Courts (AOC) but only in connection with the preparation of a motion pursuant to a civil or criminal rule. A better solution is broader and easier access, perhaps through discovery, and would include data and documents related to the highly discretionary use of excuses, deferrals, or disqualifications which are at odds with random selection, and any information on proposed changes to the jury selection process. Concerns about juror privacy interests, which do not outweigh the constitutional and statutory rights of criminal defendants, can be managed with a protective order.

Additionally, AP II §14 requires destruction of jury selection records after the jury is discharged. This makes it impossible to make a systematic challenge. The simple solution is longer retention of the jury selection records, from filing the initial challenge at the trial level all the way through any post-conviction challenges.

c. Expanding the Jury Source Lists.

Another remedy to provide a federal and state constitutionally selected jury is to look at the jury *source list* in order to reach broader groups. The sole use of voter registration lists has been found problematic because African Americans "tend to register to vote in numbers below their share of the adult population." Robin E. Schulberg, *Katrina Juries, Fair Cross-section Claims, and*

the Legacy of Griggs v. Duke Power Co., 53 LOY. L. REV 1, 19 (Spring 2007) (citations omitted). And "[c]ensus data . . . suggests that 'registered voters tend to be older, white and more affluent than the general population.'" Ashish S. Joshi and Christina T. Kline, *Lack of Diversity: A National Problem with Individual Consequences* 6 (2015), www.amercanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html. In 2008, 29% of voting aged citizens were not registered to vote. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion n Fair Cross-Section Claims Must Be Expanded,* 59 DRAKE L. REV. 761, 779 (Spring 2011).

The federal Jury Selection Service Act (JSSA), promulgated by Congress in 1968, requires the use of voter registration and voter lists, and the use of a supplemental second source list in certain locations where it is necessary to achieve a constitutional balance. 28 U.S.C §1863(b)(2) (2006). According to Hannaford-Agor, forty-three states and the District of Columbia use two or more source lists – thirty-one use at least two and eleven mandate the use of three or more. Hannaford-Agor, 59 DRAKE L. REV. at 780. Other source lists are included to capture those who might be missed. For instance, six states (including DC) incorporate those receiving some form of public benefit in their source list.[19]

[19] Connecticut (CONN. GEN. STAT. § 51-222a(a)-(c)) (unemployment compensation); District of Columbia (D.C. CODE § 11-1904) (public assistance benefits); Illinois (705 ILL. COMP. STAT. ANN. 305/1a-1) (unemployment insurance); New York (N.Y. JUDICIARY LAW § 506 (McKinney)) (unemployment and

Twenty-two states (including DC) include those with state identification cards in their source list.[20] Additionally, nine states use utility rolls to comprise the source list.[21] While Kentucky does use multiple source lists – driver licenses, voter registration, and income tax rolls – supplementing the source lists with lists similar to those used in other state and federal courts would provide a broader, more encompassing group. KRS 29A.040(1); AP II §2.

d. Updating Juror Addresses.

A consistent problem throughout the states is undeliverable questionnaires and summonses due to *out-of-date addresses*. According to Hannaford-Agor, because 12% of the population moves each year, an accurate list at the beginning of the year is outdated by the end of the year one out of eight times. Hannaford-Agor, 59 DRAKE L. REV. at 782. Many states and the American Bar Association (ABA) recommend updating the list annually, and as an interim measure between renewals, "courts may update their address records using the Postal Service's national Change of Address (NCOA) database to

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welfare rolls); Rhode Island (9 R.I. Gen. Laws Ann. § 9-9-1 (West)) (unemployment roll); Wisconsin (Wis. Stat. Ann. § 756.04 (West)) (unemployment compensation roll).

[20] Arkansas (ARK. CODE ANN. § 16-32-303); Connecticut (CONN. GEN. STAT. § 51-222a(a)-(c)); Delaware (45 DEL. CODE ANN. § 4507); District of Columbia (D.C. CODE § 11-1904); Florida (FLA. STAT. § 40.01); Georgia (GA. CODE ANN. § 15-12-40.1(a)); Illinois (705 ILL. COMP. STAT. ANN. 305/1a-1); Indiana (IND. CODE § 33-28-5-12); Kansas (KAN. STAT. ANN. § 43-162); Maine (14 M.R.S.A. §1252-A); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 8-206 (West)); Michigan (MICH. COMP. LAWS § 600.1304); Montana (MONT. CODE ANN. § 61-5-127 (2015)); Nebraska (Neb. Rev. Stat. Ann. § 25-1628(1) (West)); New Hampshire (N.H. REV. STAT. ANN. § 500-A:1); North Dakota (N.D. CENT. CODE § 27-09.1-05); Ohio (OHIO REV. CODE ANN. § 2313.06); Oklahoma (OKLA. STAT. ANN. TIT. 38, § 18 (West)); Rhode Island (9 R.I. GEN. LAWS ANN. § 9-9-1 (West)); Utah (UT R J ADMIN Rule 4-404); Washington (WASH. REV. CODE ANN. § 2.36.055 (West)); Wisconsin (WIS. STAT. ANN. § 756.04 (West)).

[21] Alabama (ALA. CODE. § 12-16-60); California (CAL. CIV. PROC. CODE § 197); Nevada (NEV. REV. STAT. § 6.045 (West)); New York (N.Y. JUDICIARY LAW § 506 (McKinney)); North Dakota (N.D. CENT. CODE § 27-09.1-05); Pennsylvania (42 PA. CONS. STAT. ANN. § 4521 (West)); South Carolina (S.C. CODE ANN. § 14-7-130); Tennessee (TENN. CODE ANN. § 22-2-301 (West)); Vermont (VT. STAT. ANN. TIT. 4, § 953 (West)).

improve jury yields and minimize waster printing and postage expenses associated with undeliverable mail." *Id.*

e. Enforcing Jury Summonses.

Although courts may be reticent to enforce jury summonses, studies have shown that it is highly effective possibly because courts are seen as taking the matter as seriously as any other court order. *Id.* at 784-85. With follow-up enforcement, nonresponse rates fell from 11% to 5% to less than 1% in Eau Claire, Wisconsin and from 41% to 2.7% in Los Angeles County. *Id.* In a NCSC study, courts that followed up reported nonresponse and failure to appear (FTA) rates 24% to 46% less than courts that reported no follow-up. *Id.* Kentucky does provide follow up procedures that require the court to issue a show cause for a juror who is FTA, and allows the court to use contempt powers. AP II §17(1). Implementation of this already existing process could be an effective way of addressing nonresponse and FTA rates.

Other suggestions to get a better response from those summonses that do get delivered is a decision to send one form (a combined questionnaire and jury summons); first send a summons and then follow-up with the qualification form; redesign the forms for ease in reading and comprehension; and to allow the questionnaire to be completed online. Chernoff, 64 HASTINGS L.J. at 191; Joshi, at 6. According to NCSC data a decision such as above can "significantly" affect the rates of undeliverable mailings, nonresponse rates and FTAs. Chernoff, 64 HASTINGS L.J. at 191. Other ideas are to require a shorter jury service - one

day or one trial; increase jury pay;[22] provide free parking; increase information about jury service through publicity campaigns; provide better communication with businesses and employers; and provide better education efforts with new citizens and minorities. *See* Leslie Ellis and Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy,* 78 CHI-KENT L. REV. 1033, 1054 (2003); Joshi, at 6.

f. Actions Against the State.

18 U.S.C. § 243, which also applies to state courts, could also be a solution:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

18 U.S.C. § 243. Although enacted in 1875, the statute has resulted in few prosecutions. *Rose v. Mitchell,* 443 U.S. 545, 558 (1979); *Vasquez v. Hillery,* 474 U.S. 254, 262 (1986) (no prosecutions in the last nine years). Resort to this statute, especially if the penalty applied to each excluded juror, would be symbolic in its message that no one is excluded and recourse is available against

[22] The United States Supreme Court struck down systematic exclusion of low-income wage earners from jury service in *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 223-24 (1946). An increase in jury pay could help low-income persons have the opportunity to serve. In 2010 Colorado paid $50 per day; New York paid $40 per day and the difference between the lower wage and jury pay; Nevada paid $40 per day; Dallas County raised from $6 to $40 per day; federal courts paid $40 per day; and in Connecticut the state reimburses up to $50 for out of pocket expenses for the first five days and pays $50 per day thereafter. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy,* August 2010, n. 267-70.

those responsible for enforcing the law. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (2010), 46.

g. Ultimately, Allow Judicial Discretion.

In the meantime, as in the case at bar, it is important to allow the trial court to use its discretion to correct the constitutional violations in a particular case. In 2013, Chicago Federal District Judge Milton Shadur was faced with a panel of forty-five that included only one African American in the trial of an African-American defendant. He adjourned the trial for a couple of days until an adequately multiracial jury could be summonsed. Annie Sweeney and Cynthia Dizikes, *The balancing act of jury selection*, CHICAGO TRIBUNE, Mar. 27, 2013, http://articles.chicagotribune.com/2013-03-27/news/ct-met-juries-racial-mix-20130327_1_jury-selection-prospective-jurors-new-jury; *see also* Peggy Senzarino, *Judge dismisses potential jury for lack of diversity*, GLOBE GAZETTE, May 12, 2015, http://globegazette.com/news/local/judge-dismisses-potential-jury-for-lack-of-diversity/article_be2d5787-cf74-5fe6-8ac6-6adadf31bc3b.html (Iowa judge dismissed a 112 member jury pool after determining that an African-American man charged with murder could not get a fair trial when 111 jurors were Caucasian and one was Native American). While discretionary rulings – because they are discretionary - will not be consistent, as shown by a colleague of Judge Shadur's in the same district who denied a constitutional challenge when faced with an all-Caucasian pool of fifty for a trial of another African-American defendant, it does allow judges to take steps within their

discretion, when a need arises, to provide a defendant with an acceptable jury pool from which to draw. Sweeney, *supra.*

In summary, the failure to collect juror race information as an assurance that the defendant's constitutional rights are not being violated because no one is keeping track is little comfort to the defendant whose constitutional rights are at stake. Mr. Doss asserts that the trial court did not abuse its discretion, but even if this Court finds that it did, *Omotosho* provides some insight:

> Because Plaintiff has failed to show that African Americans in Youngstown, Ohio, are systematically excluded from the jury selection process, the Court denies Plaintiff's motion for a new trial. Although the motion is denied, the Court cannot ignore the startling evidence showing that African Americans have been, and are likely to continue to be, seriously underrepresented in the pool of qualified candidates available for jury service in Youngstown. This underrepresentation hobbles the judicial system by diminishing the quality of jury deliberations, obstructing the capacity of juries to reach decisions reflecting the community's sense of justice, and threatening public confidence in the fairness and impartiality of the courts. The Court will not pretend that a solution is readily or easily available. To preserve the promise of the fair and equal administration of justice, a greater commitment must be made to study, understand, and combat this insidious problem.

Omotosho, 997 F. Supp. 2d at 807-08. It is clear that more can and should be done by the government to fulfill its responsibility of providing an impartial jury pursuant to the Sixth and Fourteenth Amendments and Section 11 of the Kentucky Constitution, and to allow the criminal defendant the tools to undertake a constitutional challenge.

Conclusion. Based on the above, Mr. Doss submits the following in answer to the specific questions upon which this Court has granted certification of law:

I.a. May a trial court dismiss a jury based upon a claim that the fair cross-section requirement has been violated when there has been no evidence of systematic exclusion of a class of persons from jury service?

I.b. Does it matter if there was only one African-American juror on the panel and that juror was struck randomly?

As the United States Supreme Court has promulgated the test that must be followed for a fair cross-section challenge, existing precedent addresses these questions. Certification of the law is not the remedy in this case. The Commonwealth had a remedy other than requesting certification of the law. CR 76; 76.36.

Alternatively, in Argument I, *supra,* Mr. Doss addressed the above questions specifically to the facts in his case. Mr. Doss disagrees that the trial court abused its discretion in dismissing the panel. Undisputed evidence established that 2% (one of forty-one) African-American representation on Mr. Doss's jury panel was vastly disproportionate to the local African-American population of 18% to 20%; even the Commonwealth admitted that the number of African-Americans in this jury pool was "abnormally low." VR 11/19/14; 09:44:38. But ultimately Mr. Doss was faced with an impossible burden. Mr. Doss was unable to prove systematic exclusion, a basic requirement of a successful fair cross-section challenge, because of Kentucky's failure to collect or retain juror race information. Without that information, a successful Sixth Amendment

challenge is impossible. As shown above, the trial court retains discretion to rule in favor of a party upon whom the state has placed an impossible burden. Without the trial court being able to use its discretion as it did herein, the rights of Mr. Doss and any other Kentucky criminal defendant to an impartial jury representative of the community guaranteed by the Sixth Amendment (and Section 11 of the Kentucky Constitution) is meaningless.[23]

II.a. Does the Commonwealth have a right to proceed with a duly selected jury when a *prima facie* case that the jury violates the fair cross-section requirement has not been made?

II.b. Is the Commonwealth or a defendant's right contingent upon the racial makeup of the petit jury selected?

Again, existing precedent from the United States Supreme Court addresses both of these questions. Just as in Question I above, certification of the law is not the remedy in this case. The Commonwealth had a remedy other than requesting certification of the law. CR 76; 76.36.

As stated above in Question I and in Argument II on facts specific to this case, the trial court did not abuse its discretion under the Sixth (or Fourteenth) Amendment(s) or Section 11 of the Kentucky Constitution in dismissing the panel due to the impossible burden of proof placed upon Mr. Doss.

III. What, if any rights, do citizens who have been duly selected as jurors have to be sworn and hear a case when there is no evidence of systematic exclusion of a class of persons from jury service?

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[23] The trial court also did not abuse its discretion in dismissing the jury panel based on the Fourteenth Amendment Equal Protection grounds. The State's failure to collect or retain juror race information is also a roadblock to an equal protection challenge. In intentionally enacting such roadblocks, the State is discriminating against those seeking equal protection in jury selection.

Again, existing precedent addresses this question. The United States Supreme Court has held that a juror is entitled to equal protection under the Fourteenth Amendment to be free from intentional discrimination based solely on race, while the Sixth Amendment right to an impartial jury selected from a fair cross-section applies only to criminal defendants. So, just as in Questions I and II above, certification of the law is not the remedy in this case. The Commonwealth had a remedy other than requesting certification of the law. CR 76; 76.36.

As stated in Questions I and II and in Argument III above on facts specific to this case, under equal protection analysis, the trial court (if it is considered a "state actor" under *McCollum*) had a constitutionally based race-neutral reason to dismiss the all-Caucasian jury panel – because it was not representative of the community. As such, the equal protection rights of the Caucasian jurors on the dismissed panel were not violated.

IV.a. May a trial court disregard and instruct the parties to disregard prior sworn statements made on the record by prospective jurors during a previous *voir dire* proceeding?

IV.b. Should the trial court consider such statements in evaluating whether the juror should be struck for cause?

IV.c. May the parties rely on such prior statements as grounds for seeking removal for cause as grounds supporting the exercise of a peremptory challenge?

Again, existing precedent addresses this question. Certification of the law is not the remedy in this case. The Commonwealth had a remedy other than requesting certification of the law. CR 76; 76.36.

In any event, precedent indicates that the trial court erred, although ultimately the Commonwealth has shown no prejudice.

In addition to the Court's consideration of the above questions upon which it took certification, Mr. Doss respectfully requests that this Court also consider implementing any remedies as outlined above that it finds appropriate. At the very least, two remedies that are absolutely necessary are the collection and retention of juror race information, because, without that information, Mr. Doss and other similarly situated Kentucky criminal defendants will never be able to effectively assure their rights to an impartial jury selected from a representative fair cross-section as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution. To remain with the *status quo* is to render these constitutional rights meaningless.

Respectfully submitted,

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APPENDIX

1. AOC-005 Juror Qualification Form (Rev. 03-15)
   http://courts.ky.gov/resources/legalforms/LegalForms/005A.pdf App. A